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overcoming the federal courts' reluctance to entertain suits of this character. The breakthrough came when the Supreme Court upheld the standing of an individual employee to sue under section 301, LMRA, on a breach of collective bargaining agreement.²⁰ Although the holding in this case was restricted to the no-discrimination clause in the agreement,²¹ it may set the stage for an ultimate establishment of federal substantive law which the states would be uniformly bound to apply.

Courtland R. LaVallee

PERSONAL AND REAL PROPERTY

ADVANCE REJECTION OF CURABLE DEFECTS IN TITLE TAKEN AS DEFAULT

Plaintiff had contracted for the purchase of defendant's one-family house and made a \$4,000 deposit at the time of contract. Plaintiff obtained a month's adjournment of the closing date.¹ During this month, and two weeks before the new date, plaintiff informed defendant by letter to his attorney that "the present structure of the premises is not legal and thus title is unmarketable" and demanded immediate return of the deposit. No indication of the specific illegalities, however, was given defendant before the date set for closing. On the closing date, another demand was made and refused, and neither party was then able to perform and neither made any tender. Plaintiff commenced an action for return of the deposit plus costs of searching title, and defendant counterclaimed for damages for breach of contract. A judgment for plaintiff in Trial Term was reversed on the law and the facts by the Appellate Division,^{1a} which directed judgment for defendant on the counterclaim. On plaintiff's appeal, *held*, affirmed. Since the title defects were curable within a reasonable time after notice "plaintiff's advance rejection of title and demand for immediate return of the deposit was unjustified and an anticipatory breach of contract." *Cohen v. Kranz*, 12 N.Y.2d 242, 189 N.E.2d 473, 238 N.Y.S.2d 928 (1963).

The rules of law applicable to land sales contracts are well established to a large extent. One of these rules is the warranty of good and marketable title in every contract for the sale of real estate.² Since the ancient doctrine of caveat emptor survives in the law of real property more than in any other area of law,

20. *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962).

21. *Id.* at 201.

1. The instant case uses the term "law day" to designate the day set for performance of the land sale contract. However, since the term is used generally in relation to a date set for payment on a mortgage before foreclosure, the term "closing date" will be used throughout this note to avoid possible confusion. See *Kortright v. Cady*, 21 N.Y. 343, 345 (1860); cf. *Tymon v. Willis*, 36 N.Y.S.2d 206, 207 (New York City Ct. 1942).

1a. 15 A.D.2d 938, 226 N.Y.S.2d 509 (2d Dep't 1962); *Cohen v. Kranz*, 12 N.Y.2d 242.

2. See generally *Wallach v. Riverside Bank*, 206 N.Y. 434, 100 N.E. 50 (1912); 3 *American Law of Property* § 11.47 (4th ed. Casner 1958); 3 *Warren's Weed*, New York Real Property 366-68 (4th ed. 1958).

a warranty of good and marketable title has long been implied for the purpose of giving the purchaser an adequate opportunity to examine the title prior to law day without the danger of having to accept an unmarketable title.³ Of course, good and marketable title does not necessarily mean perfect title.⁴ Thus, many rules of law have developed over the years to balance the interests of the parties to a land sale agreement. On the one hand, a purchaser does not want to be forced to accept real estate which is so encumbered as to make it useless for his purpose. On the other hand, a vendor does not want any and every minute defect on his title to be an excuse for the avoidance of an otherwise binding agreement. From this background, therefore, the courts have long allowed a vendee to recover money paid on a contract where vendor's title is incurably defective.⁵ In such a case the vendee need not wait until closing date to make his demand,⁶ nor does he have to show tender or even a willingness and ability to perform.⁷ The great majority of the litigation in this area, however, arises where the title is, or may be, curable—*i.e.*, made marketable.⁸ Where title is curable without difficulty within a reasonable time, it has been established that tender and demand are essential to put the vendor in default in order to recover money paid on the contract.⁹ Judge O'Brien, in *Ziehen v. Smith*,¹⁰ set down the proposition that the mere existence on the closing date of an incumbrance on the property, which was within the power of the vendor to remove, did not constitute a breach of contract between the parties.

The general rule . . . seems to be that . . . it is the duty of him who seeks to maintain an action for breach of the contract, either by way of the damages for the non-performance, or for the recovery of money paid thereon, not only to be ready and willing to perform on his part, but he must demand performance from the other party.¹¹

In other words a vendor should be given the opportunity to retrieve his default by curing the defects.¹² Concomitant with this precept is the rule that where

3. *Monogram Dev. Co. v. Natben Constr. Co.*, 253 N.Y. 320, 171 N.E. 390 (1930).

4. See, *e.g.*, *Allen v. Hyland*, 30 Misc. 2d 632, 215 N.Y.S.2d 587 (Sup. Ct. 1961); *Cymerman Bros., Inc. v. Payne Homes, Inc.*, 5 Misc. 2d 792, 160 N.Y.S.2d 135 (Sup. Ct. 1957); *Holdridge v. Roberts*, 195 Misc. 646, 89 N.Y.S.2d 619 (Syracuse Munic. Ct. 1949). See also 3 *Warren's Weed*, *op. cit. supra* note 2, at 368-70; 3 *American Law of Property*, *op. cit. supra* note 2, at § 11.48.

5. *Greene v. Barrett, Nephews & Co.*, 238 N.Y. 207, 144 N.E. 503 (1924); *McCarten v. Smith*, 163 App. Div. 900, 148 N.Y. Supp. 89 (2d Dep't 1914); *Roberts v. New York Life Ins. Co.*, 195 App. Div. 97, 186 N.Y. Supp. 422 (1st Dep't 1921); *Reizen v. Larkin Lumber Co.*, 133 Misc. 755, 233 N.Y. Supp. 133 (New York City Ct. 1928).

6. See *Restatement, Contracts* §§ 283-84 (1932). *Cf.*, *Egert v. Amsterdam Development & Sales Co.*, 149 Misc. 755, 268 N.Y. Supp. 236 (New York City Munic. Ct. 1933).

7. *Greene v. Barrett, Nephews & Co.*, 238 N.Y. 207, 144 N.E. 503 (1924); *Roberts v. New York Life Ins. Co.*, 195 App. Div. 97, 186 N.Y. Supp. 422 (1st Dep't 1921). *Cf.* *Bigler v. Morgan*, 77 N.Y. 312 (1879).

8. For divers definitions of marketability, see authority at *supra* note 4.

9. *Higgins v. Eagleton*, 155 N.Y. 466, 50 N.E. 287 (1898). See also *Vandergrift v. Cowles Eng'r. Co.*, 161 N.Y. 435, 55 N.E. 941 (1900).

10. 148 N.Y. 558, 42 N.E. 1080 (1896).

11. *Id.* at 561, 42 N.E. at 1081.

12. *Harris v. Shorall*, 230 N.Y. 343, 130 N.E. 572 (1921).

title is curable, reasonable time must be given to the vendor to make good and marketable title.¹³ It is neither unreasonable nor uncommon for a vendor to ask for extensions of time beyond the original closing date for this purpose, where time is not of the essence to the contract.¹⁴

Whereas a vendee's right to recover money paid on a contract for the sale of real estate can rest solely on the vendor's default—where title is incurable—an action for damages for breach of contract requires more. Generally a tender of performance by the complainant and a demand for performance on the other party are prerequisites to put that party in default.¹⁵ An exception to the requirements of tender and demand is made where they would be useless or futile.¹⁶ This is the reason why no requirement of tender of performance and demand for performance is attached to a vendee's recovery of money paid on a contract where vendor has an incurable title.¹⁷ But tender and demand have also been held futile, and thus excused, where one party has averred, by words or actions, that he refuses to perform his part of the contract, or makes it impossible for the other party to carry out his duties under the contract.¹⁸ Such an "anticipatory breach" clearly entitles the party relying upon it to neglect or refuse to perform or make tender of the performance due from him, and he may also recover damages from the party refusing to perform.¹⁹ It has also been stated, however, that the refusal to perform must be positive and unequivocal in order to amount to a breach of contract.²⁰ Further, where the breach or refusal to perform has been caused by both parties to the contract, one party should not be permitted to take advantage of a condition he helped to bring about.²¹

In the instant case the court used an established rule of vendor-purchaser law and an often used rule of contract law as the bases of its decision. First, Judge Burke, speaking for the court, decided that "plaintiff is barred from recovering the deposit from a vendor whose title defects were curable and whose performance was never demanded on law day."²² Considerable effort was spent in distinguishing the case of an incurable defect, where the vendor is automatically in default, and the case of curable defects, where the vendor must be placed in default by tender and demand. In the instant case the defects

13. *Ballen v. Potter*, 251 N.Y. 224, 167 N.E. 424 (1929). See also *Jenkins v. Fahey*, 73 N.Y. 355 (1878).

14. *Ballen v. Potter*, *supra* note 13.

15. *Higgins v. Eagleton*, 155 N.Y. 466, 50 N.E. 287 (1897).

16. *Norris v. McMechen*, 134 Misc. 866, 236 N.Y. Supp. 486 (Sup. Ct. 1929). See also *Stern v. McKee*, 70 App. Div. 142, 75 N.Y. Supp. 157 (1st Dep't 1902).

17. See *Gabel v. Hastings Homes Co.*, 221 N.Y. 578, 116 N.E. 1046 (1917).

18. *Lace Selling Co. v. Shapiro*, 249 N.Y. 68, 162 N.E. 586 (1928); *Windmuller v. Pope*, 107 N.Y. 674, 14 N.E. 436 (1887); *Palmer v. Golden*, 221 App. Div. 360, 223 N.Y. Supp. 897 (3d Dep't 1927).

19. See generally 5 Williston, *Contracts* § 699 (3d ed. 1961); *Restatement, Contracts* § 306 (1932).

20. 4 Williston, *Contracts* § 1324 (2d ed. 1938); *Restatement, Contracts* § 318 (1932).

21. *Imperator Realty Co. v. Tull*, 228 N.Y. 447, 127 N.E. 263 (1920). See also *Gray v. Met Contracting Corp.*, 4 A.D.2d 495, 167 N.Y.S.2d 498 (1st Dep't 1957).

22. Instant case at 246, 189 N.E.2d at 476, 238 N.Y.S.2d at 932.

were minor and curable with little difficulty. Yet, the vendee, rather than requesting that these defects be cured by the closing date, demanded, instead, the return of the deposit. From these facts the court had little trouble in denying the vendee's recovery of the money deposited on the contract. Second, the court also found for the vendor on his counterclaim for damages for breach of contract. This decision was based on the conclusion that the vendee's actions amounted to an attempt to cancel or rescind the contract and was unjustified, thus making any attempt by defendant to cure the defects unnecessary. Further, plaintiff's failure to specify the defects before the closing date made any attempt to cure the defects impossible.²³ In this manner the court was able to avoid the requirement of tender and demand to place the vendee in default on vendor's counterclaim for breach of contract, although the court had stressed the necessity of tender and demand to place the vendor in default on vendee's suit for the recovery of the deposit.

The rules affecting the sale of real estate are extremely important, not only to the practicing lawyer, but to every person who owns, or seeks to own, his own house or other real property. Because of their frequent everyday use it is not uncommon that these rules are well established and, to a large extent, taken for granted.²⁴ Occasionally the courts have the opportunity to restate and re-examine these fundamental rules; yet all too often the opportunity is disregarded and the case is decided on the basis of the pertinent historical doctrine without looking to such things as changing conditions or practical everyday usage. The instant case is a thorough, well written and well organized decision. The law of curable defects and a basic rule of contract law are carefully set forth and applied to the circumstances of the case as the bases of the decision. These rules are logically sound and thus the decision is probably correct as a matter of logic. Several questions, however, might have been properly discussed by the court from an everyday practical point of view. For instance, a demand for a return of a down payment may be an anticipatory breach as a matter of logic, as held by the court in the instant case. However, as a matter of everyday practice and experience it may be no more than a demand for rescission *if* the defects are not cured.²⁵ Also, could it not be argued that the demand was, in effect, a notice to the vendor, although an inadequate notice of the nature of the defects, and such notice should shift the burden to the vendor to ask

23. On the necessity of notice of defects to vendor, see generally *Bigler v. Morgan*, 77 N.Y. 312 (1879); *Groden v. Jacobson*, 129 App. Div. 508, 114 N.Y. Supp. 183 (2d Dep't 1908); 3 American Law of Property, *op cit. supra* note 2, at § 11.51.

24. For a critical analysis of conveyancing in New York and the changes which should be made, see generally Nelson, *Conveyancing in New York*, 43 Cornell L.Q. 617 (1958); Cribbet, *Conveyancing Reform*, 35 N.Y.U.L. Rev. 1291 (1960).

25. See *Monds v. Birchell*, 59 Misc. 287, 112 N.Y. Supp. 249 (Sup. Ct. 1908) which stands for the proposition that a demand for the return of a down payment on a contract for the sale of land amounts to a rescission. However, the consequence was merely that the purchaser's assignee could not sue for specific performance, but only for the return of the down payment—the remedy of specific performance having been waived by the demand. *Quaere*: Should this case be usable as authority for allowing a suit for damages for breach of contract by a vendor under circumstances like the instant case?

for a more definite statement of the objections to the title if he was not aware of what defects the vendee's letter referred? In other words, how much particularity of notice is required? Finally, could it not be argued that at best the vendor could disregard the demand as an inadequate notice and lay a foundation for a claim of damages by making tender of title on the closing day in its condition at that time? In the instant case the vendor is required to do absolutely nothing because of the vendee's breach. Yet one of the cases cited by the court in support of this position states:

[I]f an excuse were relied upon, then he was bound to allege facts constituting such excuse, and, in addition thereto, that he was at the time ready and had the ability to perform, and would have done so except for the acts of the other parties to the contract.²⁶

Perhaps the court should have taken a closer practical look at the inaction of the vendor as well as the breach of the vendee before having granted the vendor his counterclaim for damages for breach of contract.

Peter H. Bickford

EMINENT DOMAIN—FUNCTIONS AND REVENUE PRODUCTION INCIDENTAL TO PRIMARY PUBLIC PURPOSE CONSIDERED BY COURT

The actions constituting the bases of this appeal are a suit for a declaratory judgment to determine the constitutionality of chapter 209, New York Laws 1962 and a condemnation proceeding to take certain Hudson & Manhattan Terminal property for port authority purposes. The litigants in both controversies were the Port of New York Authority and its subsidiary, the Port Authority Trans-Hudson Corporation, and property owners affected by the proposed condemnation. The challenged statute authorized the creation of a World Trade Center and modernization and extension of the rail facility with the purpose, as stated in section 6601(7)¹ of establishing a centralized location to accommodate all appropriate functions related to world commerce. Section 6602 designated a thirteen block area on the west side of lower Manhattan, including the present Hudson & Manhattan Terminal, as the site of the project. Section 6614 authorized the port authority to determine and acquire "necessary and convenient" property for public use in implementing the project. Courtesy Sandwich Shop contested the proposed condemnation of its property on the grounds that the authorization of the World Trade Center involved an unconstitutional delegation of powers to the port authority, and that since the terminal and trade center projects were inseparably joined in the legislative scheme, the unconstitutionality of the former would invalidate any power to take private property at the Hudson Tubes location. The Supreme Court, Special Term, granted an order of condemnation and vested title to Courtesy Sandwich Shop in the Port

26. *Stern v. McKee*, 70 App. Div. 142, 146, 175 N.Y. Supp. 157, 160 (1st Dep't 1902).

1. N.Y. Unconsol. Laws (McKinney 1961).